Heiliger Electric Corp. *and* International Brotherhood of Electrical Workers, Local Union No. 1141. Cases 17–CA–18472 and 17–CA–18472–2

June 29, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 23, 1998, Administrative Law Judge D. Randall Frye issued the attached decision. Counsel for the General Counsel filed exceptions and a supporting brief, and counsel for the Respondent filed a brief in opposition to the exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The complaint is dismissed.

[1] The motion of the Associated Builders and Contractors, Inc. to file an amicus brief, received shortly before this decision was ready for issuance, is denied as moot.

[2] The General Counsel has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's dismissal of the complaint, Members Fox and Liebman find it unnecessary to pass on whether the videotaping itself was protected activity. Under the particular circumstances of this case, they agree with the judge that ''the overall environment created by the applicants was, at the very least, sufficiently intimidating and disrespectful to privilege a decision by Respondent to not hire the five applicants.''

Francis A. Molenda, Esq., for the General Counsel.
Charles W. Ellis, Esq. (Lawrence & Ellis, P.A.), of Oklahoma City, Oklahoma, for the Respondent.

DECISION

STATEMENT OF THE CASE AND BACKGROUND

D. RANDALL FRYE, Administrative Law Judge. This case was tried before me on March 3, 1997, in Oklahoma City, Oklahoma. The underlying complaint issued on May 10, 1996, and essentially alleges violations emanating from ''salting'' efforts by the International Brotherhood of Electrical Workers, Local Union 1141 (Local 1141 or Local Union).

During the course of the trial, the parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Posthearing briefs were filed by counsel for Respondent and counsel for the General Counsel. On the entire record, including my observation of the demeanor of the witnesses, and after fully considering the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Heiliger Electric Corporation (Company or Respondent) is engaged in the electrical contracting business and annually purchases and receives at its Oklahoma City, Oklahoma facility, goods valued in excess of $50,000 from points outside of Oklahoma. Local Union 1141 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The complaint alleges that Respondent, by the conduct of its President and owner, Roger Heiliger, interrogated employees about their union membership, activities, and sympathies. The complaint further alleges that Respondent unlawfully refused to hire applicants John August Cortier Jr., Michael Duncan, Charles Ley, Tom Pinion, Kurtis Reel, and Charles Gravitt. It is further alleged that this conduct by Respondent is violative of Section 8(a)(1) and (3) of the Act.

A. *Facts*

On December 10 and 11, 1996, at the direction of Respondent, the following advertisement appeared in the local newspaper, The Daily Oklahoman:

> Electricians & Journeyman. Exp. helpers, commercial only. Must have 4 years exp. Call 946–2662.

On December 11, 1995, the five alleged discriminatees[1] were present at the hiring hall operated by Local 1141. One of the five, Cortier, had read the advertisement in the local newspaper. On behalf of the group, Cortier called the listed number and spoke with Respondent's supervisor, Mark Hobbs. Another union member captured this conversation on videotape with Local 1141's video camera. Both the video and audio portion of Cortier's conversation was recorded. In addition, the audio portion of Hobb's side of the conversation was recorded from a speaker phone used by Cortier. (Tr. 28–30, G.C. Exh. 14.) During the phone conversation, Cortier inquired about Respondent's hourly rates of pay and the number, types, and location of jobs. Hobbs suggested that Cortier visit Respondent and complete an application. When informed that he had a buddy who needed work, Hobbs further suggested that he also apply.

After the above conversation, the five alleged discriminatees traveled to Respondent's office in the local union's automobile. The group parked in front of the entrance to Respondent's office. After getting out of the car, Cortier began operating the video camera and recorded, in its entirety, the visit and application process at Respondent's facility.

A review of the videotape, (G.C. Exh. 14) shows the five individuals entering through the front door of Respondent's facility from the parking lot. The entire office area is very

[1] Gravitt, who did not go to Respondent's facility to apply until January 4, 1997, will be discussed separately.

small and consists of an outer area and a private inner office located at the back of the outer area. The outer area appears to be approximately 200 square feet. The inner office, appears to be no larger than 80 square feet. When the five entered, Heiliger was on the phone in the outer office. Hobbs was in the small inner office. The group walked past Heiliger and partially into the smaller office. Heiliger promptly ended his telephone conversation and asked the group to go outside. He also asked Cortier several times to turn off the video camera. These requests were not honored. The five individuals informed Hobbs that they were members of the local union and wanted to apply for jobs. For the most part, Tom Pinion was spokesperson for the group.

Heiliger testified at trial, that he and Hobbs were intimidated by the conduct of the group of applicants as he considered them to have taken control of his office since they would neither leave nor discontinue the videotaping. According to Heiliger he did not ''know if they were there to cause me physical harm or what.'' When asked by counsel at trial if he was afraid, Heiliger responded, ''Absolutely, I was afraid. I mean . . . physically intimidated. I mean, there were guys there and I don't know whether they're there to kick my ass or what.'' (Tr. 91.) Heiliger also testified that both he and Hobbs were disturbed by the conduct of the applicants while in the facility. According to Heiliger they were ''pretty well just running me around. They did whatever they wanted to do, acted however they wanted to act. . .'' During this encounter, Heiliger tried to contact his lawyer to seek advice but could not reach him. Since the group would neither leave nor discontinue using the video camera, Heiliger, testified that he had no alternative but to permit the group to stay. Ultimately the five individuals completed their employment applications. Before leaving they inquired of Heiliger as to how many journeymen and helpers he employed and the location of his jobsites. Based on the above events, Heiliger concluded that he would not employ any of the applicants.

On January 4, 1997, Charles Gravitt visited Local 1141's office and inquired of Pinion about potential jobs. Pinion informed Gravitt of the December 11, 1995 visit to Respondent's office and Respondent's refusal to hire any of the five who had applied. Nonetheless, he suggested to Gravitt that he might be hired if he would apply at one of Respondent's large jobsites. Accordingly, Gravitt went to one of these sites and asked for the ''man in charge.'' He spoke with an individual whose name he could not recall. (Tr. 65.) In response to Gravitt's question about the availability of jobs, this unnamed individual stated, ''[Y]eah; that they were just covered up and there was no way that they could finish this job in time.'' After obtaining directions, Gravitt went to Respondent's facility and spoke with Heiliger who provided him with an employment application. After the application was completed, Heiliger met with Gravitt during which the latter inquired, inter alia, about the location of Respondent's jobsites and the number of employees employed. Heiliger testified that he was particularly troubled by the evasiveness of Gravitt in responding to his questions about prior employment. On his application Gravitt listed only one prior employer, Anderson Electric. Heiliger stated that he inquired further about prior employment to determine Gravitt's level of experience as an electrician. After several questions, Gravitt finally stated that he had also worked for Dandy Electric. Although asked to do so by Heiliger, he refused to include this information on his application. Accordingly, Heiliger wrote the name, Dandy Electric, on Gravitt's application.

In his complaint, the General Counsel alleges that it was during this particular conversation, that Heiliger unlawfully interrogated Gravitt concerning his union and or protected activities. Gravitt's testimony that Heiliger had asked him if Dandy Electric was or had been union was offered to support this complaint allegation. For reasons more fully explicated below, I do not credit this aspect of Gravitt's testimony.

B. *Decision*

Section 7 of the Act vests in employees the ''right . . . to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .'' Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to ''interfere with, restrain, or coerce employees'' in the exercise of their Section 7 rights. Section 8(a)(3) of the Act proscribes employer ''discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . .''

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402–403 (1983), the Supreme Court approved the Board's test for determining unlawful motivation, first applied by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Under that test, the General Counsel must show that the employee's protected union activity was a ''motivating factor in'' the employer's decision with respect to an employee's hire or tenure of employment. Whether the employer's motive is unlawful in taking employment related action is a fact based issue to be determined by the Board. *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1002 (10th Cir. 1977). In making this determination, the Board relies upon both direct and circumstantial evidence, and considers, such factors as the employer's knowledge of the employees union activity, the timing and abruptness of the employment related action, and the employer's reliance on pretextual reasons to justify its employment related decision. The Board has also held that the protection of Section 8(a)(3) is fully applicable to applicants for employment even when the applicant is seeking employment to organize the employer's employees. Finally, where an employee's union activity is shown to be a motivating factor in the employer's decision, the employer will be found to have violated Section 8(a)(3) and (1) of the Act unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of the protected conduct. *NLRB v. Transportation Management Corp.*, supra, affirming *Wright Line*, supra.

In the instant case, the December 11, 1995 group activity of visiting Respondent's small office began with the stated intention of applying for positions of employment previously advertised by Respondent. Such group activity normally enjoys the full protection of the Act. Moreover, in addition to seeking employment, an announced purpose of the group was to organize Respondent's employee-protected activity at the very heart of the Act. However, as discussed below, under the unique circumstances here present, the applicants en-

gaged in conduct which privileged Respondent's refusal to employ them.

The conditions and circumstances under which an employment application process may be conducted is, in large part, within the control of an employer. However, an employer must conform its employment application process to numerous Federal and State laws including the National Labor Relations Act. In its brief, counsel for the General Counsel argues, inter alia that the videotaping of an employment application process is activity protected by the Act, when done for preservation of proof. As support for this position, the General Counsel cites *Delta Mechanical, Inc.*, 323 NLRB No. 5 (Feb. 26, 1997). However, in *Delta*, the issue of whether videotaping an application-interview process by an applicant for the purpose of preserving proof is protected by the Act, is simply not present. Rather, the procedural issue there present was whether the videotape of an application-interview process was producible pursuant to the Board's Jencks rule (29 CFR § 102.118 (b)(1) and (d)) or subject to the subpoena process and admissible as direct evidence. The Board adopted, pro forma, Judge Linton's decision in which he concluded that the videotape was producible pursuant to a lawfully issued subpoena and admissible into evidence as direct evidence of the events and contemporaneous statements there at issue. This result obtains as the Jencks rule is applicable to statements of witnesses that contain current descriptions of past events. A video recordation of a substantive event is direct evidence of that event, not a current description of the past event.

In the instant case, the videotape was also admitted into evidence during trial as direct evidence. However, neither the Board's decision in *Delta*, nor evidentiary rulings in the instant case create, as a matter of law, a right by a job applicant to videotape an employer's application-interview process. Moreover, there does not appear to exist any Board precedent which would provide the underpinnings for such an argument.[2]

Similarly, there is no provision in the Act or in the law developed by the Board that would require an employer to permit its employment application process to be recorded by an applicant or anyone else with a video camera or subjected to rude or intimidating conduct. In the absence of such a right, the failure of an applicant to adhere to lawful conditions imposed by an employer on it's employment application process could lawfully result in the (1) termination by the employer of the employment application process; or, (2) refusal by the employer to hire the applicant[s] involved.

In the instant case, Heiliger, upon observing the use of a video camera, immediately asked the group to leave. In fact, as clearly revealed on the videotape, he retreated to the front door of the outer office and invited the group outside. As they refused to honor this request, he thereafter asked, several times, that the video camera be turned off, a request also refused.

As revealed by his testimony, Heiliger was not only concerned by the videotaping of the employment application process but also the conduct of the applicants. Thus, as credibly testified to by Heiliger, and as revealed on the videotape, the group of applicant's entered the small outer office and immediately proceeded to the much smaller inner office. Because of its size, all of the applicants could not enter the inner office. However, the video camera operator was given full access by the other applicants, which permitted close up views of personal papers on Heiliger's desk. According to Heiliger, this conduct was disrespectful and intimidating and conveyed the impression that the group intended to take over his office, an impression he believed was confirmed by the group's refusal to leave.

I fully credit the testimony of Heiliger in all respects based on demeanor. His testimony was forthright and wholly consistent with the evidentiary picture presented by the videotape of the events in question. On the other hand, the factual picture presented by some of the Charging Party witnesses was not as forthright. In this regard, Cortier stated in his telephone conversation with Hobbs that he wanted to apply for a job and be hired by Respondent. However, as observed from the videotape, Pinion had to encourage Cortier to actually complete an application. In fact, toward the end of the application process, Pinion asked Cortier if he wanted to complete an application. His response was ''it doesn't matter to me.'' (G.C. Exh. 14.) Similarly, several applicants failed to provide complete and/or accurate information on their employment applications. This evidence tends to discredit the stated intentions by the applicants that they were there seeking work.

In summary, based on the above credited testimony and my review of the videotape, the overall environment created by the applicants was, at the very least, sufficiently intimidating and disrespectful to privilege a decision by Respondent to not hire the five applicants. In so concluding, I particularly note the following significant factors: the applicant's refusal to leave after being requested, the refusal to discontinue videotaping, the intrusive nature of the videotaping, and the close scrutiny and videotaping of personal and private papers on Heiliger's desk. The fact that the issue of knowledge of union activity was clearly provided in this case by Pinion's statement to Heiliger that the Local Union wanted to organize Respondent's employees does not change the result. From this record, it is clear that the employees' protected union activity was not the basis for Respondent's refusal to employ them and thus was not a ''motivating factor'' in Respondent's decision.

Respondent's refusal to employ Charles Gravitt, the sixth applicant, was also lawful. The credited testimony of Heiliger reveals that Gravitt was not hired because Heiliger believed that he had been evasive during the employment application process. In this regard, Heiliger observed during the interview that Gravitt had not provided sufficient prior employment information on his application. He therefore asked Gravitt if he had any additional prior employment. In response, Gravitt said, ''[W]ell, you know, I kind of help . . . my cousin . . . on the side; or every once in a while, I'll go work for him.'' (Tr. 94.) Ultimately, Gravitt revealed that this employment had been with Dandy Electric. Heiliger then asked if Gravitt would include Dandy Electric on his application. When he declined to do so, Heiliger wrote the name of that employer on the application. Gravitt's version of this conversation is quite different. He testified that, even though he had not revealed his prior employment with Dandy Electric on his application or during the interview, Heiliger ''asked me if he [Dandy] [w]as ever union or if he was in

[2] The General Counsel also cites *Concord Metal*, 295 NLRB 912 (1989), however this case does not support such an argument.

the Union, and I said, he was at one time but he isn't anymore.'' Gravitt's recollection of this conversation is not credible. Any suggestions that Heiliger would randomly select Dandy Electric, an employer with whom Gravitt had been associated since high school, as the subject of his alleged unlawful inquiry is implausible. In this regard, no factual context was presented within which such an inquiry might logically be placed. On the other hand, Heiliger's version of the conversation, particularly as it relates to the inclusion of Dandy Electric on Gravitt's application, is far more plausible. This version is in perfect symmetry with the events unfolding, i.e., the interview by Heiliger and his attempts to ascertain the experience level of applicant Gravitt. As above noted, I have credited the testimony of Heiliger in all respects. In addition, I specifically discredit the testimony of Gravitt with respect to the alleged unlawful inquiry as to whether Dandy Electric was a union employer. Therefore, I need not address the issue of whether such an inquiry, if made, would be violative of Section 8(a)(1) of the Act.

As I have found each allegation of the complaint without merit, I shall recommend that it be dismissed in its entirety.

CONCLUSION OF LAW

Based on the record, I find that the Board has statutory and discretionary jurisdiction; that Respondent Heiliger Electric Corporation is an employer engaged in commerce within the meaning of Section 2 (2), (1), and (7) of the Act; that International Brotherhood of Electrical Workers Local Union 1141 is a statutory labor organization; that Respondent Heiliger has not unlawfully interrogated employees in violation of Section 8(a)(1) of the Act and that Respondent Heiliger has not unlawful refused to hire applicants in violation of Section 8(a)(3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed in its entirety.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.